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DEPARTMENT OF
WATER RESOURCES

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**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION OF) **CM-DC-2011-004**
WATER TO WATER RIGHT NOS. 36-02551)
AND 36-07694) **SURFACE WATER COALITION'S**
) **PRE-HEARING**
(RANGEN, INC.)) **MEMORANDUM**
_____)

COME NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company (collectively, the "Surface Water Coalition" or "Coalition") by and through their undersigned attorneys of record, and pursuant to the *Fifth Amended Scheduling Order*, hereby submit the following pre-hearing memorandum.

I. Eastern Snake Plain Aquifer Model (ESPAM) 2.1

The Idaho Department of Water Resources (IDWR) completed the development of the Eastern Snake Plain Aquifer Model 2.0 in the summer of 2012. Shortly after the model's completion, the Eastern Snake Hydrologic Modeling Committee (ESHMC) submitted the following statement to the Director:

The Eastern Snake Hydrologic Committee recommends that the Department begin using ESPAM version 2 rather than ESPAM version 1.1 for ground water modeling.

Rick Raymondi July 16, 2012 email to Director Gary Spackman.

The committee did not qualify its recommendation. Thereafter, the Director accepted the committee's recommendation and ordered that IDWR "will utilize ESPAM version 2.0 in the [Rangen, Inc.] delivery call." *Order Re: Eastern Snake Plain Aquifer Model and the Rangen, Inc. Delivery Call* (July 27, 2012).

Following the completion and acceptance of ESPAM 2.0, Department staff discovered a numerical mistake in certain input data in the Mud Lake area. Department staff corrected the mistake and recalibrated the model which resulted in ESPAM 2.1. The Department issued a Final Report for ESPAM 2.1 concluding the following:

Although every model represents a simplification of complex processes, with the ESPAM being no exception, ESPAM 2.1 is the best available tool for understanding the interaction between groundwater and surface water on the Eastern Snake Plain. The science underlying the production and calibration of ESPAM 2.1 reflects the best knowledge of the aquifer system available at this time. ESPAM 2.1 was calibrated to 43,165 observed aquifer levels, 2,248 river gain and loss estimates, and 2,845 transient spring discharge measurements collected from 14 different springs. Calibration parameters indicate an excellent representation of the complex hydrologic system of the eastern Snake Plain.

Final Report at 89 (Exhibit 1273A).

The Department then issued a *Staff Memorandum* in this case recommending that the Director use ESPAM 2.1 as the predictive tool to evaluate the depletive effects of groundwater pumping and the benefits of curtailment on the Rangen spring cell. *Staff Memo* at 3 (Ex. 1319). ESPAM 2.1 represents the best available science for evaluating the effects of pumping and curtailment of junior priority ground water rights in the Eastern Snake Plain Aquifer on hydraulically connected surface water sources, including the Rangen spring cell.

The Surface Water Coalition's experts and IDWR staff will provide testimony supporting this position at hearing.

II. There is No Factual, Technical, or Legal Basis to Qualify ESPAM 2.1 Modeled Results.

The concept of a "trim line" was contrived to qualify the modeled results of ESPAM 1.1. The "trim line" was applied to delineate an area within the aquifer where individual junior groundwater pumping was assumed to result in less than ten percent (10%) depletion on the river reach at steady state. The alleged technical basis for the "trim line" was the error rating in Snake River gages, one of the inputs into the model. Although the rating of Snake River gages (a single parameter) was used to ascribe a one-way 10% margin of error to the modeled results, the "trim line" did not result from a technical or scientific uncertainty analysis of ESPAM 1.1. Indeed, while the actual Snake River flow may vary up to 10% higher or lower as compared to the gage measurement reading, agencies and watermasters still rely upon the gage measurement for administration and planning. The measurement is not qualified.

Regardless, former Directors used the 10% "trim line" to qualify the ESPAM 1.1 modeled results of actions taken on the ESPA (both simulated curtailment and mitigation actions). The 10% "trim line" is an artifact of the use of ESPAM 1.1 and does not define model uncertainty in any way. No expert has submitted testimony attempting to define the 10% "trim

line” on a technical basis. IGWA’s and the City of Pocatello’s experts defer to the 10% “trim line” solely based upon the prior model version and its historic use in other administrative proceedings. None of the intervenors’ experts submitted any reports or testimony supporting the former “trim line” with any independent scientific or statistical analysis.

A. No Factual or Technical Evidence Supports a “trim line.”

Since version 1.1 of the model is no longer current and used by IDWR, the reliance upon a misunderstood “uncertainty” or “margin of error” associated with that model is similarly outdated and has no place in current water rights administration or planning. Indeed, no party is relying upon ESPAM 1.1 in this proceeding.

ESPAM 2.1 represents a new and improved version of the model. It is a more robust tool and represents the best science available for simulating and evaluating impacts on the aquifer and hydraulically connected surface water sources. The Surface Water Coalition’s experts and IDWR staff will present and support this position at hearing.

No party’s expert in this case has performed a comprehensive uncertainty analysis or a rigorous statistical evaluation to assign justifiable confidence limits on the modeled results. Stated another way, there is no technical or statistical evidence to qualify the modeled output to a defined percentage. Accordingly, the ESPAM 2.1 modeled results represent the best and most likely outcome of actions taken on the ESPA. Since the Director accepts ESPAM 2.1 he is obligated to use the tool appropriately and without qualification for water right administration.

IDWR’s technical staff concurs with the above position. In the *Staff Memorandum*, they agreed that a “trim line” concept is not technically justified:

Whether a trim line should be applied, and the basis for delineating a trim line, are policy and/or legal decisions.

Staff Memo at 5 (Exhibit 1319).

Without a technical or statistical basis to support qualifying the modeled results, the Director cannot assign a quantified percentage to define a “trim line” or so-called “margin of error” in using ESPAM 2.1. Any percentage would therefore be arbitrary and not supported by the best available science in this case.

B. No Legal or Policy Theory Supports a “trim line.”

Finally, the use of a 10% “trim line” is not supported by any IDWR policy or legal theory. Idaho’s prior appropriation doctrine requires administration of all surface and ground water rights together, or conjunctively. *See Clear Springs v. Spackman*, 150 Idaho 790, 800, 808 (2011). The hallmark of lawful administration is that junior water rights cannot take water that would otherwise be put to beneficial use by a senior water right. IDAHO CONST. Art. XV, § 3; I.C. §§ 42-602, 607. The SRBA Court has legally determined that all water rights in the basin must be administered as connected sources, unless excepted with a separate streams general provision. *See Basin Wide Issue No. 5, Connected Sources General Provision (Conjunctive Management), Memorandum Decision and Order of Partial Decree* (Subcase No. 91-00005) (February 27, 2002). Further, junior groundwater users carry the burden to prove, by clear and convincing evidence, no injury to seniors as a result of their out-of-priority diversions. *See A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 284 P.3d 225, 249 (2012). This is so because defenses impeding administration to deliver the full amount of the senior water right impinge upon an adjudicated water right, which is a property right, whether the defense is legal, factual, or technical.

The Conjunctive Management Rules (CM Rules) follow Idaho law and do not excuse any injurious out-of-priority pumping on any legal basis. *See* CM Rules 20, 40. The rules require administration of all junior priority ground water rights located within the Eastern Snake Plain


Aquifer, an area of common ground water supply. *See* CM Rule 50. The Director and watermaster must administer junior ground water rights causing injury to a senior water right within an organized water district. *See* CM Rule 40. Consequently, unless a defense is proven by clear and convincing evidence, any junior ground water right that unlawfully takes water away from a senior surface water right must be administered without qualification. Therefore, the use of a “trim line” is not justified by any legal or policy theory. The Director should not apply a “trim line” in the use of ESPAM 2.1.

III. Conclusion

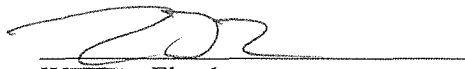
ESPAM 2.1 represents the best available science for conjunctive administration and should be used without qualification. No party has submitted any credible evidence to alter this conclusion. The “trim line” artifact associated with a prior version of the model is inapplicable for purposes of using ESPAM 2.1 and has no technical or legal support in this case. The Director should properly apply ESPAM 2.1 to the Rangen call to ensure all hydraulically connected junior ground water rights are administered in accordance with Idaho law.

Dated this 22nd day of April, 2013.

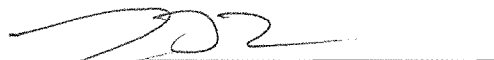
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of April, 2013, the above and foregoing document was served on the following via email and first class mail, postage prepaid:

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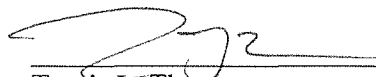
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